



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

November 25, 2014
OM 14-38

Mr. Frederick W. Faerber III

Re: Faerber v. Portsmouth School Committee

Dear Mr. Faerber:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Portsmouth School Committee (“School Committee”) is complete. You are a member of the School Committee and by email correspondence dated May 27, 2014, you allege the School Committee violated the OMA when it held meetings outside the purview of the public and without notice. These meetings allegedly occurred on January 23, 2014 and February 20, 2014. By email correspondence dated June 16, 2014, you supplemented your complaint and alleged that a quorum of the School Committee engaged in discussions, outside the public purview, regarding the T3 project (turf field, track and tennis court replacement) and a 2.4% school budget increase.¹

In response to your complaint, we received a substantive response from the School Committee’s legal counsel, Mary Ann Carroll, Esquire, who also provided sworn affidavits from five (5) School Committee members. Attorney Carroll states, in pertinent part:

“all five (5) Members indicate that in their opinion, these [1/23/14 & 2/20/14] meetings were actually ‘get-togethers’ in order to meet and greet potential Superintendent candidates.

¹ You also alleged that the School Committee violated the OMA by discussing public business outside the purview of the public prior to its June 18, 2013 meeting regarding a new Superintendent. This Department requested that you supplement this allegation within ten (10) business day to indicate why it would not be barred by the statute of limitations pursuant to R.I. Gen. Laws § 42-46-8(b). We received no response, and therefore, do not review this allegation.

It is the position of the Members of the Committee that [they] attended the get-togethers, that they did not discuss, nor did they act upon, any matter over which they have jurisdiction. These meetings with potential candidates were not a formal interview and no decision was made.

* * *

The Committee was very serious about finding the right candidate to begin in this position on July 1, 2014, and therefore, they felt it was important to have informal talks over coffee, regarding philosophy of several potential candidates. In no way did they intend to violate the open meeting law, and in no way did they believe they were conducting business. As a matter of fact, they looked toward these get-togethers as somewhat of a social, non-business reception, where the[y] get to talk to potential candidates.

We respectfully request that you review your Open Meeting Advisory 99-01.”

Mr. Croston states, in pertinent part:

“I am the Chairman of the Portsmouth School Committee.

I was in attendance at the meetings of January 23, 2014 and February 20, 2014.

I called, arranged, and attended both informal ‘meet and greets’ referenced in this complaint.

These meetings occurred at the Crown Plaza in Warwick, Rhode Island * * * and at the Portsmouth Publick House, Portsmouth Rhode Island * * *

The Superintendent Search Sub-Committee had yet to be formed and the position of Superintendent had not been posted at the time of these meetings.

As a Committee we were determined to ‘head hunt’ talent to apply for the position of Superintendent.

These ‘meet and greets’ did not conduct any business and did not provide either candidate an advantage over another. We were pitching our District, the unity of the School Committee, and the vision of our District.

None of the discussion raised new information or non-public information.

The two meetings in question were the only meetings in which a majority of members attended; but, a minority of members met other candidates from around the State in late Fall and Early Winter.

No business was conducted at these meetings.

At least five members of the Portsmouth School Committee were present at each meeting.”

Mr. Vadney, states in pertinent part:

“The discussion focused on education issues like the Common Core State Standards and Portsmouth’s new STEAM initiative.
Management style and the ability to manage were also discussed.

Though I considered both of them as potential superintendent candidates, they were not candidates at the time, as the school committee had not begun the search process.”²

We acknowledge your reply dated June 17, 2014.

On August 22, 2014, this Department contacted the School Committee’s legal counsel who inadvertently failed to respond to your second OMA allegation. On September 10, 2014, this Department received affidavits from the seven (7) School Committee members addressing the allegation that members of the School Committee engaged in rolling quorums prior to the March 19, 2014 meeting.

Mr. Croston states, in pertinent part:

“The T3 project was discussed by the Portsmouth School Committee from September 2012 to the subsequent approval in April 2014.

On May 1, 2013, the Portsmouth School Committee entered into an engineering contract with Gale Associates to design and provide cost estimates for the project.

In the Fall of 2013, the project design team presented design options to the School Committee twice; and the School Committee voted on a preferred design in October of 2013.

In January/February of 2014, the School Committee created and funded a capital projects fund for the T3 Project and the fire code upgrades at Hathaway Elementary.

² As the three (3) other School Committee Members’ affidavits were substantially similar to Messrs. Croston and Vadney, their content is not repeated in this finding. The three School Committee members are Ms. Terry Cortvriend, Ms. Emily Copeland and Mr. Andrew Kelly.

In January 2014, an RFP for project construction was published and a bid opening was held on February 26, 2014.

In February I requested, and received, a vote of the Town Council approving use of \$285,000.00 of 'Impact Fees,' funds dedicated for school use but held by the Town Council.

Subsequently, in March 2014, the School Committee held a workshop of the entire School Committee ([Ms.] Emily Copeland was on travel) where the project was reviewed and debated in detail with our engineers.

One week later the T3 Project was brought to the School Committee for approval. The project was awarded to Green Acres Construction the first week of April 2014.

The idea that any project discussed by the School Committee on greater than ten (10) different occasions did not have adequate public notice or discussion is without merit. During the entire two (2) years of discussion, many questions and answers were made by and between members.

Discussions of the value of this project and the timing of this project occurred in the normal course of our review.

These meetings were informational and part of the normal transfer of material facts and positions – all of which were stated publicly at scheduled School Committee meetings by members of the committee on numerous occasions.

* * *

There were discussion between members, but those discussions centered on publicly available data and were only items that had been well discussed at numerous public meetings.

The budget was developed over greater than eight (8) School Committee meetings solely for that purpose and debated line by line.”

Ms. Terri Cortvriend states, in pertinent part:

“The School Committee voted on several issues regarding the T3 project.

These votes took place at advertised public meetings over several months and I attended these meetings.

There were many sub-committee meetings when plans were discussed in detail held in between regular school committee meetings of which I attended several.

As prior Vice Chair, I had many conversations with the Chair regarding the project.

These conversations dealt with the details of what was going on with the project, the donors, and the fundraising and were not related to votes.

I do not recall lobbying any other Committee members for support of the project.”

Mr. Andrew Kelly states, in pertinent part:

“I did communicate with David Croston regarding the T3 project, but I can recall no emails.

I recall no meetings with school committee members other than the posted public meetings.

In regards to the 2.4% budget increase, I did call David Croston to share my concerns about cutting school positions.

I was not part of a rolling quorum, nor do I know of any existence of such a rolling quorum.”

Mr. Thomas Vadney states, in pertinent part:

“Most of the discussion regarding the T3 project and the 2.4% budget request took place in open session at School Committee and Town Council meetings.

I did receive occasional updates from the chair, David Croston, on the T3 project and the progress of negotiations with the Town regarding the 2.4% budget request.

The discussions were brief and informational in nature.”

Ms. Copeland states, in pertinent part:

“I was not questioned about my T3 vote prior to the formal voting of the project.

I did not participate in any rolling quorum.

I know of no general polling about the votes for the 2.4% budget increase.

In regards to the Superintendent’s agreement, I was not privy to any information about that agreement prior to the public meeting.

I was not involved with the negotiations with the then Superintendent.”

Mr. Wojichowski states, in pertinent part:

“On March 17, 2014, I sent an email to the private fundraising group for the T3 project.

Mr. Croston was included on that email.

I was concerned about the donation amounts listed on the March 19th agenda and I requested that the fundraising group promulgate a report articulating how much has been raised and was being managed by Corrigan Financial.

Mr. Croston responded to that email that he would post this information in backup material for our full School Committee meeting of March 19th, and he offered to walk me through it prior to the meeting.

On the night of the 18th, we were meeting with abutters to Portsmouth High School at the High School’s library to review the T3 project and how it would impact them.

Prior to the start of the meeting, Mr. Croston showed me his papers reflecting the amounts raised to date.

To the best of my recollection, I had no other communications with any member of the School Committee regarding the T3 project outside of public meetings.

To the best of my recollection, I had no communications with any member of the School Committee regarding the FY15 budget or the 2.4% increase outside of public meetings.”

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the School Committee violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

The OMA was enacted by the General Assembly because “[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy.” R.I. Gen. Laws § 42-46-1. In order for the OMA to apply, a “quorum” of a “public body” must convene for a “meeting” as these terms are defined by the OMA. See Fischer v. Zoning Board of the Town of Charlestown, 723 A.2d 294

(R.I. 1999). A “quorum” is defined as “a simple majority of the membership of a public body.” R.I. Gen. Laws § 42-46-2(d). For purposes of the OMA, a “meeting” is defined as “the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” R.I. Gen. Laws § 42-46-2(a). See Zarella et al. v. East Greenwich Town Planning Board, OM 03-02. All three of these elements (a quorum, meeting, and public body) must be present in order for the OMA to apply; the OMA is not applicable when one or more of these elements is absent. Id.

Here, it is undisputed that on January 23, 2014 and February 20, 2014, a “quorum” of School Committee members, i.e., a “public body,” met outside the purview of the public. In order for the OMA to be implicated, we need to determine if the third element, namely a “meeting,” was conducted. Based upon the facts presented, a quorum of the School Committee met on two (2) occasions with potential candidates for School Superintendent. The purpose of these meetings was to “head hunt” talent to apply for the position of School Superintendent. The meetings involved the discussion of potential candidates’ views of education issues such as the Common Core State Standards and the Portsmouth’s STEAM initiative. The potential candidates also presented management style and discussed their ability to manage. Even though the School Committee members indicate that no School Committee business was discussed, we respectfully disagree.

Accordingly, we conclude that the School Committee violated the OMA by not posting notice of the January 23, 2014 and February 20, 2014 meetings. Based upon the evidence presented, it appears that at both of these meetings, a quorum of the School Committee met outside the purview of the public to discuss business over which the School Committee has supervision, control, jurisdiction, or advisory power.” R.I. Gen. Laws § 42-46-2(a).

Legal counsel for the School Committee requested that this Department review this Department’s Advisory Opinion, 99-01. Although legal counsel does not state how this Advisory Opinion is analogous to the instant case, a review of the facts of that Advisory Opinion is warranted. In the 99-01 Advisory Opinion, the then-Cranston Mayor sought to hold a reception for members of the General Assembly to “familiarize legislators and others with the history and status of the City of Cranston” and he felt that “a social, nonbusiness event would be a desirable setting in which to educate senators and representatives about the State’s third largest municipality.” As a courtesy, the mayor also invited members of the City Council and School Committee. We opined, based upon the specifics facts presented in that case, “that the mere attendance of members of the Town Council and School Committee at this social, non business reception did not by itself constitute a violation of the Open Meetings Act. However, the members of these public bodies may not discuss or act upon any matter over which the public bodies have jurisdiction, supervision, control or advisory power at this social, non-business reception or, for that matter, outside of a properly noticed meeting.” (Emphasis added).

The facts presented in that Advisory Opinion are not analogous to the facts of the instant case. By their own admission, notwithstanding the meeting places, this was not a “social” event or a reception. This was an active discussion by a quorum of a public body on topics over which the

public body had supervision, control, jurisdiction or advisory power. As such, the School Committee violated the OMA with respect to this allegation.

We now turn to the merits of your second allegation, namely that members of the School Committee engaged in rolling quorums prior to the noticed meeting of March 19, 2014. In your initial complaint, you alleged that "Mr. Croston would call several or perhaps all [School Committee] members to see if he has the vote for an upcoming issue." You further state that "some [School Committee] members were not cooperative with Mr. Croston's desired votes so he thought he had to poll before he put it on the agenda and was sure he had the minimum 4 votes." In your supplemental affidavit, you indicate that you spoke with Mr. Croston by telephone and you asked if he had the votes of at least two (2) other School Committee members. You state, "Mr. Croston said he did, specifying [Mr.] Tom Vadney, [Mr.] Andrew Kelly and [Ms.] Terri Cortvriend on the 2.4% budget request in particular." Respectfully, you provide no timeframe or context when any of these conversations occurred. Moreover, the fact that Mr. Croston allegedly told you he had certain votes does not, by itself, evidence a walking or rolling quorum. Accordingly, we simply find insufficient evidence to find an OMA violation.

Despite our conclusion, we would be remiss if we did not express our concern that the evidence demonstrates at least some communications occurred outside the public purview. While we have found insufficient evidence to find an OMA violation, we nonetheless express our concern. Even your complaint, which alleges a walking or rolling quorum, suggests that you were contacting School Committee members in order to determine the level of support you had to bring a vote of "no confidence." This also concerns us. Lastly, although perhaps irrelevant, we also note that in a telephone conversation with the undersigned you expressed that you filed this OMA complaint to be "vindictive."

Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies in suits filed under the OMA: (1) "[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];" or (2) "[t]he court may impose a civil fine not exceeding five thousand (\$5,000) dollars against a public body or any of its members found to have committed a willful or knowing violation of [the OMA]." R.I. Gen. Laws § 42-46-8(d).

Although the School Committee violated the OMA by not properly posting notice for the January 23, 2014 and February 20, 2014 meetings, there has been no evidence presented that the School Committee took any action at these meetings. Therefore, it appears that the School Committee did not vote or make any decisions that the Superior Court could declare null and void. There is also no evidence to indicate that the School Committee willfully or knowingly violated the OMA. This finding serves as notice to the School Committee that its actions violated the OMA and may serve as evidence of a willful or knowing violation in any future similar case.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so

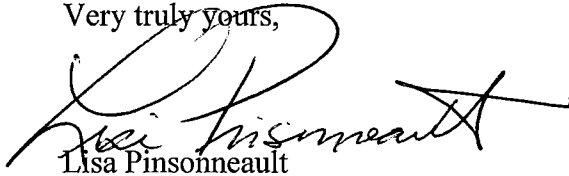
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within ninety (90) days from the date of the Attorney General's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. R.I. Gen. Laws § 42-46-8. Please be advised that we are closing our file as of the date of this letter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Pinsonneault", with a large, stylized initial "L" and a long horizontal stroke extending to the right.

Lisa Pinsonneault

Special Assistant Attorney General

Extension 2297

LP/pl

Cc: Mary Ann Carroll, Esquire